2003

Salt Lake County v. Robert Gibson : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 200300710-CA Trial Court No. 021912683
vs.	:	
ROBERT GIBSON	:	
Defendant/Appellant.		

APPELLEE BRIEF

An Appeal From Conviction For One Count of Violating a Protective Order, a Class A Misdemeanor, In the Third District Court, Salt Lake County, The Honorable Paul Maughan, presiding.

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ORAL ARGUMENT and PUBLISHED OPINION NOT REQUESTED

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff, -v.- ROBERT GIBSON, Defendant	Case No. 200300710-CA Trial Court No. 021912683

As counsel for the state I, R. Josh Player, will not need to file extra addendum to accompany the State's response for the above mentioned case.

RESPECTFULLY submitted on this 6th day of August 2004.

DAVID YOCOM
Salt Lake County District Attorney

R. Josh Player
Deputy District Attorney
Attorney for Plaintiff/Appellee

IN THE UTAH COURT OF APPEALS

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over all criminal convictions that do not involve a first-degree felony or a capital offense pursuant to Utah Code Ann. §78-2a-3(2)(e). Because the contested conviction is an Appeal From Conviction For One Count of Violating a Protective Order, a Class A Misdemeanor, in violation of Utah Code Ann. §76-5-108(1), the Utah Court of Appeals has appellate jurisdiction.

ISSUE ON APPEAL, STANDARD OF REVIEW, AND PRESERVATION

Issue. Did the trial judge render a guilty verdict based on an incorrect standard of criminal negligence, were facts from trial an impermissible variance from the information filed, was the evidence presented at trial

sufficient to sustain a conviction and was the Protective Order issued against the Defendant unconstitutionally vague?

Standard of Review. On appeal, State v. Gordon, 2004 UT 2, ¶ 5; 84 P. 3d 1167, 1168, provides the correct standard of review for issues of fact. *Gordon* holds that the standard of review for findings of fact for bench trial is to, "sustain the trial court's judgment unless it is against clear weight of evidence."

Preservation. Issues that are the basis of this appeal were the basis for Defendant's defense at trial court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following statute is relevant to this appeal:

Utah Code Ann. §76-5-108(1).

STATEMENT OF THE CASE

On November 21, 2002, the Defendant was charged by information with one count of violating a Protective Order sexual abuse of a minor, a Class A misdemeanor, in violation of Utah Code Ann. §76-5-108(1). (Information).

On April 17, 2003, before Judge Paul Maughan of the Third District Court, the Defendant was found guilty of violating a Protective Order. (R. 89: 49, lines 8-9).

On June 23, 2003, Judge Maughan sentenced the Defendant to 180 days in jail (granting 24 days for time served and suspending the remaining 156 days) and ordered the Defendant to pay a fine of $350. (R. 90: 11, lines 20-21).

On August 26, 2003, the Defendant filed a notice of appeal.

STATEMENT OF THE FACTS[1]

On July 30, 2002 Tamara Gibson was granted a Protective Order shielding herself and her two daughters, R.G. and C.G., from the Defendant. (State's Exhibit 1) The Protective Order specifically prohibited the Defendant from frequenting the schools attended by his daughters. (State's Exhibit 1, p. 2, item 5). The Oquirrh Middle School is not listed by name on the Protective Order.

On October 31, 2002, the victim R.G. observed the Defendant waiting in his vehicle in the parking area outside of her school. (R. 89: 5, lines 15-22). Later that same day, R.G. again saw the Defendant passing by the school in his vehicle. (R. 89: 10, lines 19-20). That same afternoon, the Defendant went to the residence of Mike Black, near the school, specifically because the Defendant believed R.G. was at the residence with Mr. Black's son. (R. 89: 10, lines 22-24 and Information).

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[1] Except as otherwise noted, this brief recites the facts in the light most favorable to the trial court's verdict. *See* State v. Litherland, 2000 UT 76, ¶ 2, 12 P.3d 92.

On July 28, 2003 Third District Judge Paul G. Maughan found the Defendant guilty of violating the Protective Order following a bench trial. (R. 89: 49, lines 8-9). Judge Maughan specifically found the Defendant guilty for parking his car in the student drop-off area of R.G.'s school. (R. 89: 49, lines 10-13). Judge Maughan found that the testimony of R.G. that the Defendant was in the student drop-off area to be credible and found the Defendant's contrary claims not to be credible. (R. 89: 49, line 10; 50 lines 4-6).

SUMMARY OF THE ARGUMENT

First, the conviction of the Defendant was consistent with the Information filed. Defendant claims that the facts borne out in court stand as an impermissible variance from the information filed. Specifically, the Information filed charged Defendant with a violation of the Protective Order for parking at the school his daughter attended. The trial court in fact based the Defendant's conviction on testimony from R.G. that Defendant was parked at the school and convicted him on a charge consistent the Information filed. Second, facts presented at trial were sufficient to support the conviction. The trial court judge, within the discretion allowed a trier of fact, found that the testimony of R.G. that Defendant was parked at the school in violation of the Protective Order to be credible. Third, the trial court applied the correct legal standard of knowingly and intentionally violating the Protective Order in

reaching the guilty verdict. Defendant claimed that he did not know his daughter attended the Oquirrh Hills Middle School, Judge Maughan found this testimony, "not to be credible". The judge found that the Defendant knew his daughter attended that school, and therefore when Defendant went to the school, he was knowingly and intentionally violating the Protective Order. Fourth, the Protective Order was not unconstitutionally vague. The Protective Order clearly prohibited the Defendant from appearing at his daughter's school, and the trial court found claims that Defendant didn't know where his daughter attended school not to be credible. Making the Protective Order clear enough that even the Defendant understood its implication.

The trial court verdict in this case was supported by the evidence, notably the testimony of R.G. The conviction was based on a proper and clear Protective Order, and the correct legal standard was applied and the Defendant's conviction should stand.

ARGUMENT

I. THE DEFENDANT WAS CHARGED BY INFORMATION WITH VIOLATING A PROTECTIVE ORDER ON OCTOBER 31, 2002 AT OQUIRRH MIDDLE SCHOOL AND THE EVIDENCE PRESENTED CONFORMED TO THE FORMAL CHARGE.

The information charging the Defendant stated that on October 31, 2002, at 12949 South 2700 West, in Salt Lake County, the Defendant knowingly or intentionally violated a protective order that was properly served on him. At

trial, the testimony was that on October 31, 2002, the Defendant parked his vehicle at 12949 South 2700 West, Oquirrh Middle School, and made contact with R.G. The fact that the evidence given at trial by S.G. and Mrs. Black did not conform to the Defendant's own belief of what the facts should be, does not violate the notice requirement. Furthermore, the fact that a witness was not called to testify at trial to incidents mentioned in the probable cause statement of the Information does not cause an impermissible variance. Therefore, based on the information, the Defendant was on sufficient notice to defend against the charge.

Under Utah law, there are two sources which require a defendant to be given notice of the charges against him; Rule 4 of the Utah Rules of Criminal Procedure, and due process under the Utah constitution. Rule 4 states that an "information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge." Utah Rules of Criminal Procedure 4(b). In this case, the Information specifically stated the Defendant was being charged with violating Utah Code Ann. § 76-5-108, Violation of a Protective Order. Accordingly he was placed on notice as to what the specific charges were.

Generally, a defendant is "entitled to whatever information the prosecutor has that may be useful in helping to fix the date, time and place of the offense." State v. Swapp, 808 P.2d 115, 118 (Utah Ct.App.1991). Rule 4(e) of the Utah Rule of Criminal Procedure specifically states that if more information is required to prepare a defense, the defendant may file a bill of particulars. In this case, the Defendant requested, and was provided, a copy of the police reports and other items detailing the evidence upon which the prosecution would rely at trial. The Defendant has not alleged that he was surprised by any of the evidence. Nor did the Defendant file any bill of particulars. Again, there is ample evidence the Defendant was placed on notice that he was being charged for violating a protective order by parking at Oquirrh Middle School on October 31, 2002.

Although Defendant likens his arguments to those addressed in State v. Burnett, these comparisons are misplaced. State v. Burnett, 712 P.2d 260, 262 (Utah 1985). Burnett was originally charged for stealing from one victim (his firm), then tried for stealing from other victims. That is not the case here. The Defendant was charged with violating a Protective Order, at Oquirrh Middle School on October 31, 2002. The Defendant was convicted for violating a protective order at Oquirrh Middle School on October 31, 2002. The conviction was based on S.G.'s testimony that Defendant was parked outside

of the school. The Defendant's claim that "Mr. Gibson was found to have only been in the vicinity of the school" demonstrates his reluctance to marshal the evidence, as required, and goes to a sufficiency of the evidence claim, not notice. (Appellate Brief p.1)

II. THERE IS SUFFICIENT EVIDENCE TO FIND THE DEFENDANT INTENTIONALLY OR KNOWINGLY VIOLATED A PROTECTIVE ORDER WHERE THE DEFENDANT PARKED AT R.G.'S SCHOOL AND FOLLOWED HER TO A FRIEND'S HOME.

When reviewing a trial court's finding of facts, the appellate court will "sustain the trial court's judgment unless it is against clear weight of evidence." State v. Gordon, 2004 UT 2, ¶ 5; 84 P. 3d 1167, 1168. To succeed when challenging a finding of fact of the trial court, the defendant "may not simply reargue [his] position based on selective excerpts of evidence presented to the trial court." ProMax Development Corp. v. Mattson, 943 P.2d 247, 256 (Utah Ct. App. 1997). The Defendant must first marshal all the evidence in support of the guilty verdict and then show that the evidence is legally insufficient to support a guilty verdict even when viewing it in a light most favorable to the trial court's findings. Id.

When determining what the evidence is, "[t]rial courts are given primary responsibility for making determinations of fact." State v. Pena, 869 P.2d 932, 935 (Utah 1994), *overruled on other grounds by* Campbell v. State Farm

Mut. Auto. Ins. Co., 2001 UT 89, 65 P.3d 1134. A reviewing court must "resolv[e] all disputes in the evidence in a light most favorable to the trial court's determination." Id. at 936 (citing Wessel v. Erickson Landscaping Co., 711 P.2d 250, 252 (Utah 1985)).

> A reviewing court is highly deferential to the trial court because it is before that court that the witnesses and parties appear and the evidence is adduced. The judge of that court is therefore considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record.

Id. (citing In re J. Children, 664 P.2d 1158, 1161 (Utah 1983)).

In this case, the Defendant fails to marshal the evidence, and merely attempts to reargue his position. The trial court specifically found the testimony of R.G. to be more credible. (R. 89: 5). Yet, the Defendant repeatedly argues his version of the facts. The trial court found that the Defendant's claim he accidentally went to his daughter's school was not credible. Therefore, the facts, when looking at them in a light most favorable to the trial court's findings are: the Defendant was prohibited from frequenting schools attended by R.G.; the Defendant went to the school he knew R.G. was attending; the Defendant parked at the school; the Defendant observed R.G. and made eye contact with, and smiled at her (R. 89: 10, 19-20) ; the Defendant came back to the school; the Defendant followed R.G. to a friend's home.

Based on these facts, there was sufficient evidence to find the Defendant knowingly or intentionally violated the protective order.

III. THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD WHEN IT FOUND THE DEFENDANT KNOWINGLY AND INTENTIONALLY CONTACTED R.G. IN VIOLATION OF THE PROTECTIVE ORDER.

Utah Code Ann. §76-5-108(1), requires that a person "intentionally or knowingly" violate a Protective Order to be found guilty. The trial court concluded that the Defendant did knowingly and intentionally violate the Protective Order. The trial judge stated that he did not believe Defendant's claim that he "accidentally" showed up at R.G.'s school, stating, "I don't find it credible that you were just innocently going to [the school] - that you happened to be at that location at the time school was out." (R. 89: 50). The trial judge held that the Defendant knowingly went to R.G.'s school in direct violation of the Protective Order.

The Defendant's claim that the judge applied the wrong standard at trial is based on a conversation the Defendant had with the trial court after the trial court found him guilty and after the trial court made its findings of fact. The Defendant inquired what actions he could take to avoid violating the protective order in the future. (R. 89: 50). The Defendant reargued his trial claim that even though he knows that R.G. spends time across the street from

his house and that her school is in his neighborhood, the one thing he didn't know was that R.G. attended that school. The trial court reiterated its position that he did not believe the Defendant's claims that he was unaware R.G. attended school there, (R. 89: 50, 6), and then told the Defendant that he could not be around the school and that if he chose to take the route by the school he would be running a risk of violating the protective order. (R. 89: 50, 17). The trial court refused to give an advisory opinion to the Defendant, but reiterated that on October 31, 2002 the Defendant did violate the protective order. The trial court judge was not changing the legal standard he used, but he was merely making a point to the Defendant as to what he should consider in the future. When the court stated that the Defendant, "should have known" it was not expressing the standard employed by the trial judge when rendering the guilty verdict.

IV. UTAH CODE ANN. §76-5-108 IS CONSTITUTIONAL BECAUSE IT IS NARROWLY DRAWN AND RESTRICTS CONDUCT NECESSARY TO SERVE THE GOVERNMENTAL INTEREST OF PROTECTING VICTIMS OF DOMESTIC VIOLENCE.

The Defendant asserts that the statute he was convicted of violating was unconstitutionally vague. Vagueness questions are procedural due process issues. State v. Hall, 905 P.2d 899 (Utah Ct.App.1995). The Defendant has not preserved this argument for appeal, therefore, this argument should not be considered on appeal. However, even if the Defendant properly raised the

constitutional issues, the statute under which he was convicted is constitutional. When determining whether a statute is constitutional, the Court presumes that legislative acts are constitutional, and a defendant challenging a statute bears a "heavy 'burden of demonstrating its unconstitutionality.'" State v. MacGuire, 2004 UT 4, ¶8, 84 P.3d 1171 (quoting Greenwood v. City of North Salt Lake, 817 P.2d 816, 819 (Utah 1991)).

A. The Defendant Did Not Preserve a Constitutional Vagueness Argument by His Objections That He Did Not Know R.G. Attended Oquirrh Middle School.

It is well settled that "Utah courts require specific objections in order 'to bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate.'" State v. Brown, 856 P.2d 358, 361 (Utah Ct.App.1993)(quoting VanDyke v. Mountain Coin Mach. Distrib., 758 P.2d 962, 964 (Utah Ct.App.1988)); see State v. Hardy, 2002 UT App 244 ¶14. 54 P.3d 645, 648-9. Where a defendant fails to make an argument at the trial court level, but raises the argument for the first time on appeal, "appellate courts will not consider an issue, including a constitutional issue, . . . unless the trial court committed plain error or the case involves exceptional circumstances." State v. Brown, 856 P.2d at 359.

In this case, the Defendant did not raise the constitutional vagueness argument to the trial court prior to, or subsequent to the guilty verdict. The

only reference the Defendant made regarding vagueness at trial is on page 46 of the Trial Transcript where the Defendant argued that the protective order is a "little vague." (R. 89: 46 line 14). There was no mention at the trial that the protective order was constitutionally vague. Although the Defendant claims he argued the statute was vague, his argument went solely to refute the mens rea of the prohibited conduct. He claimed that because the protective order did not list his daughter's school by a specific address, that he could not have known she was attending school there, and therefore, could not have "intentionally" nor "knowingly" violated the protective order. Neither argument implicates the constitutional doctrines of vagueness. For these reasons, this Court should not consider these constitutional issues for the first time on appeal.

B. The Statute is Not Vague Because the Conduct Prohibited is Specifically Defined in the Statute and Incorporated Into the Protective Order.

The Defendant continuously asserts that because the protective order did not specifically list the address of the school where R.G. was attending, that the protective order was vague. The vagueness doctrine has been applied to statutes only. The Defendant's argument that he could not have known he could not go to Oquirrh Middle School is a defense to the mens rea of "intentionally" or "knowingly," not a constitutional argument regarding a

statute. Furthermore, any argument that §76-5-108(1) is constitutionally vague is unsupportable.

When a statute does not implicate constitutionally protected conduct, a statute is only void for vagueness where "the statute is impermissibly vague in all of its applications." State v. MacGuire, 2004 UT 4, ¶ 12, 84 P.3d 1171 (quoting Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95, 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982)). If a statute is clear as applied to the Defendant, he cannot complain that the law is vague as applied to others. Only when a statute is not clear as applied to the defendant, must the defendant demonstrate "either (1) that the statutes do not provide 'the kind of notice that enables ordinary people to understand what conduct [is prohibited],' or (2) that the statutes 'encourage arbitrary and discriminatory enforcement.'" Id. at ¶13 (quoting State v. Honie, 2002 UT 4, ¶31, 57 P.3d 977)); see also Elks Lodges 719 & 2021 v. Department of Alcoholic Beverage Control, 905 P.2d at 1202. (finding "[a]n enactment will be held unconstitutionally vague only if the terms of the law are so ambiguous that persons of ordinary intelligence are unable to determine whether their acts conform to the law.").

In this case, the Defendant acknowledges that he knew he was not to contact his daughter or go to places she frequented. Therefore, the statute is

not vague regarding him, and because it provided the Defendant notice, he cannot complain the law is vague on its face.

Moreover, Utah Code Ann. §76-5-108(1), places the ordinary person on notice that certain conduct is prohibited. Utah Code Ann. §76-5-108(1) specifically states "[a]ny person who is the respondent or defendant subject to a protective order . . . who intentionally or knowingly violates that order after having been properly served, is guilty of a Class A misdemeanor." The statute specifically references Title 30, Chapter 6 to designate the process by which a protective order is obtained. Incorporating other sections or even regulations is permissible and sufficient to provide notice sufficient to overcome a vagueness challenge. *see* State v. Robinson, 2001 UT 21, ¶24, 20 P.3d 396. Therefore, any ordinary person would know that they could not intentionally or knowingly violate orders written in the protective order they were properly served with.

Although the Defendant couches his argument in constitutional terms of vagueness, he is rearguing his claim that he did not intentionally or knowingly violate the protective order. The Defendant never argues that he was unaware he could not contact his daughter, as ordered by the protective order. The Defendant was aware of what conduct was prohibited. His claim does not dispute whether his behavior was prohibited, but whether he intentionally

and knowingly engaged in that behavior, which is a question of the sufficiency of the evidence, not vagueness. The trial court believed R.G.'s testimony and held that the Defendant did know his daughter attended school at Oquirrh Middle School and went there intentionally and knowingly. See supra Part III.

CONCLUSION

The trial court decision was proper and the judge acted within his legal authority when he (1) relied on Rachel's testimony and not the Defendant's due to credibility concerns, (2) applied the criminal standard of knowingly and intentionally, and (3) convicted the Defendant on trial findings consistent with the information filed.

The Protective Order against the Defendant was not overly broad. The Protective Order clearly forbids the Defendant from frequenting his daughter's school and the trial court held that the Defendant did in fact know that his daughter went to Oquirrh Middle School. In the case at hand, avoiding the school does not burden the Defendant's constitutional rights.

After weighing the testimony of the witnesses, the fact-finder believed testimony of the victim and not the Defendant. With a lack of "clear and weighty" evidence to the contrary, this is not a finding that can be overturned. A trial court does not overstep its discretion when finding one witness more credible than another. The trial court found that the Defendant appeared at

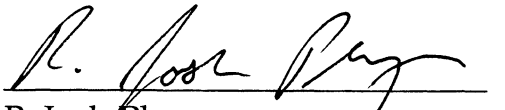
the school he knew his daughter to attend twice, thus he knowingly and intentionally violated his Protective Order.

The Defendant knowingly and intentionally violated a sound and sufficiently clear Protective Order. Therefore the State asks this court to uphold the Defendant's conviction for violating the Protective Order and deny this appeal.

Based on the foregoing, Defendant's conviction on one count of violating a Protective Order by the trial court should be affirmed.

RESPECTFULLY submitted on this 5th day of August 2004.

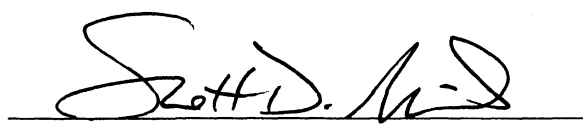
DAVID YOCOM
Salt Lake County District Attorney



R. Josh Player
Deputy District Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF DELIVERY

I, SCOTT D. MILLS, hereby certify that I have caused to be delivered eight copies of the foregoing brief to the Utah Court of Appeals, 450 South State Street, 5th Floor, P.O. Box 140320, Salt Lake City, Utah 84114-0230, and two copies to DAVID MADDOX, Attorney for the Defendant, 1108 West South Jordan Parkway, Building A, South Jordan, Utah 84095, this 5th day of August, 2004.



SCOTT D. MILLS
Law Clerk District Attorney's Office
Attorney for Plaintiff/Appellee

DELIVERED to the Utah Court of Appeals and the *Defendant* as indicated above this 5th day of August, 2004.